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DUE PROCESS IN PRISON DISCIPLINARY HEARINGS: HOW THE "SOME EVIDENCE" STANDARD OF PROOF VIOLATES THE CONSTITUTION

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Abstract: Prison disciplinary hearings have wide-reaching impacts on an incarcerated individual's liberty. A sanction following a guilty finding is a consequence that stems from hearings and goes beyond mere punishment. Guilty findings for serious infractions, like a positive result on a drug test, can often result in a substantial increase in prison time. Before the government deprives an incarcerated individual of their liberty interest in a shorter sentence, it must provide minimum due process. However, an individual can be found guilty of serious infractions in Washington State prison disciplinary hearings under the "some evidence" standard of proof—a standard that allows for a fact finder to find an individual guilty with any amount of evidence, even when overwhelming evidence indicates they are innocent. Washington lacks a statutory and regulatory basis for the "some evidence" standard of proof. Although the Washington State Supreme Court seems to have endorsed its use, a closer look at the Court's cases reveals confusion between the constitutionally required standard of proof and the standard for judicial review.

In *Superintendent v. Hill*, the United States Supreme Court held that courts must generally review prison disciplinary findings for "some evidence." *Hill* did not decide what standard of proof the Due Process Clause requires at the initial hearing. Still, subsequent Washington State cases have relied on *Hill* to justify the "some evidence" standard of proof. This Comment shows that this reliance is erroneous. Instead, courts should apply the foundational *Mathews v. Eldridge* due process analysis to determine the necessary standard of proof. In determining the necessary standard, this Comment demonstrates that using "some evidence" as the standard of proof does not meet minimum constitutional requirements. To protect the rights of incarcerated individuals, prison disciplinary hearings involving serious infractions should require the "preponderance of the evidence" standard of proof. This standard would allow cases to be correctly decided, and individuals would not be unjustly disciplined.

INTRODUCTION

Jonathan,[1] an incarcerated individual in a Washington State Department of Corrections (DOC) facility, is one of many individuals who has encountered the disciplinary process. Although correctional

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1. The name of the incarcerated individual was changed to protect confidentiality.

institutions function to deprive citizens of their freedom, they also go beyond basic deprivation and employ disciplinary codes that prohibit a range of activities. Many of these activities are not criminal, but still result in infractions and sanctions when violated.[2] Jonathan experienced an onset of deeply painful seizures and hallucinations that required him to go to the hospital and obtain medical treatment as a result of using a synthetic form of cannabis.[3] He thereafter was cited for several serious violation infractions, including possession of an intoxicating substance and causing a threat of injury.[4] One of the correctional officers who accompanied him to the hospital further charged him with an infraction for a staff assault[5]—a violation carrying serious penalties.[6] While Jonathan admitted the adverse reactions resulted from smoking a synthetic form of cannabis, he maintained that, while he was at the hospital, he asked the officer with him—who also coached him through the seizures he endured inside the ambulance—for his consent to hold his hand while a nurse checked his vitals.[7] The officer presented his arm for Jonathan to hold. While Jonathan was grabbing the officer's arm, Jonathan suffered two more short seizures.[8] As a result, Jonathan pulled the officer's arm downward, making him partially lose balance.[9] The officer characterized this action as an "assault" that led to Jonathan's infraction.[10] In Jonathan's disciplinary hearing, the hearing officer then judged this action by an unfair standard—one that failed to consider all of the presented evidence.[11] Thus, Jonathan received a disciplinary sanction[12]—among various other sanctions—that effectively lengthened his overall

2. *See* WASH. STATE DEP'T OF CORR., STATEWIDE INMATE ORIENTATION HANDBOOK (2017), https://www.doc.wa.gov/docs/publications/400-HA002.pdf [https://perma.cc/C8Z9-6CLB].

3. *See* Disciplinary Record of Jonathan (2020) (on file with author).

4. *Id.*

5. *Id.*

6. A staff assault violation can lead to a loss of points and good time. WASH. STATE DEP'T OF CORR., DOC 460.050 ATTACH. 1, DISCIPLINARY VIOLATIONS FOR PRISON AND WORK RELEASE 1 (2019) [hereinafter DISCIPLINARY VIOLATIONS], https://doc.wa.gov/information/policies/files/460050a1.pdf [https://perma.cc/YY9D-YL9F]; WASH. STATE DEP'T OF CORR., DOC 460.050 ATTACH. 2, PRISON SANCTIONING GUIDELINES 3–4 (2019) [hereinafter PRISON SANCTIONING GUIDELINES], https://doc.wa.gov/information/policies/showFile.aspx?name=460050a2 (last visited Nov. 4, 2021). Additionally, incarcerated individuals want to keep their records clear of this infraction in order to maintain positive relationships with corrections staff. *See infra* note 293.

7. Disciplinary Record of Jonathan, *supra* note 3.

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.* The Supreme Court of Minnesota discusses a "less exacting" standard of proof that relies on only "some credible evidence." Carrillo v. Fabian, 701 N.W.2d 763, 774 (Minn. 2005).

12. Disciplinary Record of Jonathan, *supra* note 3.

sentence.[13]

Using the "some evidence" standard of proof, the hearing officer found Jonathan guilty of a staff assault.[14] The evidence included a slew of officer statements—at least nine—testifying not only that Jonathan had no control over his body, but that there were no staff-reported injuries.[15] Additionally, there was video footage lasting more than an hour that showed Jonathan was unaware of what was happening and experienced extreme pain and fear.[16] Further, the medical records from the hospital indicated that Jonathan was calm and compliant, and referenced nothing about an assault.[17] The nine officers' testimonies were recorded on video immediately after the incident.[18] Regardless, two other officers' statements—written eight days after the incident—were given more weight in the disciplinary hearing,[19] notwithstanding the DOC policy stating a report for a serious violation should be submitted in a "timely manner."[20] The incident report only mentioned the assault in the last line with nothing to back it up aside from the two officers' delayed statements.[21] Jonathan was found guilty because there was some evidence alleging he committed an assault, despite the bulk of evidence showing Jonathan was incapable of intending to commit or actually committing one.

Now imagine the same incident transpiring but with Jonathan living outside prison walls.[22] In civil cases, the plaintiff has the burden of proving their case by the "preponderance of the evidence" standard.[23] With this standard, a party must prove that "something is more likely to be true than not" in order to prove their position.[24] When looking at all of the evidence presented—the nine officers' statements regarding

13. WASH. REV. CODE ANN. § 9.94A.729 (West 2021).

14. Disciplinary Record of Jonathan, *supra* note 3.

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. WASH. STATE DEP'T OF CORR., DOC 460.000, DISCIPLINARY PROCESS FOR PRISONS 6 (2018), https://www.doc.wa.gov/information/policies/showFile.aspx?name=460000 (last visited Oct. 21, 2021) ("[I].e., as soon as time allows following the violation(s), by the end of shift, upon completion of investigation.").

21. Disciplinary Record of Jonathan, *supra* note 3.

22. Andrea C. Armstrong, *Race, Prison Discipline, and the Law*, 5 U.C. IRVINE L. REV. 759, 768, 769 (2015) ("Prisoners are subject to disciplinary rules that penalize behavior that otherwise would not be punishable outside the prison walls.").

23. WASH. ADMIN. CODE § 182-16-066 (2021).

24. *Id.*

Jonathan's lack of control, the absence of staff injuries, the video proof of his mental and physical health, the hospital medical records, and the two officers' belated statements concerning the alleged assault—it suggests that Jonathan was more likely to be innocent than not. He therefore would have been found innocent against charges of assault under the preponderance of the evidence standard of proof.[25]

One small mistake made within the confines of a prison's walls can lead to extreme consequences.[26] Your one "mistake" can cost you the minuscule amount of liberty you have left. This is what happened to Jonathan. While the United States Constitution affords incarcerated individuals fewer rights than free citizens and defendants in criminal trials, they are still owed a minimum amount of due process.[27] Yet the current some evidence standard of proof in Washington prison disciplinary hearings does not meet the minimum constitutional requirements.[28] Despite incarcerated individuals already experiencing a diminished liberty interest, using an unconstitutional standard for judging their alleged misconduct has only the result of depriving them of other liberty interests—specifically their right to good time credits.[29] While the United States Supreme Court held in *Superintendent v. Hill*[30] that some evidence was appropriate for a standard of judicial review, Washington has erroneously relied on this decision to justify some evidence as the standard of proof.[31] When looking to the foundational due process analysis established in *Mathews v. Eldridge*,[32] the preponderance of the evidence standard of proof is required to protect the constitutional rights of incarcerated individuals in prison disciplinary hearings.[33]

This Comment proceeds in four parts. Part I outlines general and serious infractions, the basic prison disciplinary hearing process, and the impact the resulting sanctions can have on an incarcerated individual's liberty.[34] Part II summarizes the history of due process rights in prisons, as well as the appropriate analysis a court must embrace when considering the constitutional validity of an administrative procedure, as determined

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25. *See, e.g.*, Carrillo v. Fabian, 701 N.W.2d 763, 774 (Minn. 2005) (noting that "as a standard of proof, 'some evidence' is much less exacting than the preponderance of the evidence standard").

26. *See infra* section I.B.

27. *See* Wolff v. McDonnell, 418 U.S. 539, 540–41 (1974).

28. *See infra* Part IV.

29. *See Wolff*, 418 U.S. at 558.

30. 472 U.S. 445 (1985).

31. *See infra* section III.C.

32. 424 U.S. 319 (1976).

33. *See infra* section IV.A.

34. *See infra* Part I.

by the *Mathews* Court.[35] Then, Part III explores the difference between a standard of proof and a standard of judicial review, and how the prominent United States Supreme Court holding in *Hill* addressed only the standard of judicial review for prison disciplinary hearings.[36] Part III also evaluates the disagreement among courts about how to interpret the *Hill* decision, while pointing out the ultimate lack of authority Washington state has to back up its some evidence standard of proof in prison disciplinary hearings.[37] Following the path of courts that correctly understood the application of *Hill*, Part IV outlines an approach to remedy Washington's mistaken reliance on *Hill* by applying a *Mathews* analysis to the standard of proof used in Washington prisons.[38] This analysis thus supports the argument that the some evidence standard is unconstitutional, and the preponderance of the evidence standard should be required as the correct standard of proof in prison disciplinary hearings for serious violations.[39]

I. DISCIPLINARY HEARING DECISIONS INVOLVE SIGNIFICANT DISCRETION YET HOLD GREAT WEIGHT FOR INCARCERATED INDIVIDUALS' LIBERTY

The Washington State DOC provides a written list of rules regulating prison conduct for incarcerated individuals.[40] The disciplinary rules tend to relate to security, order, and general housekeeping.[41] When an incarcerated individual breaks one of these rules, they are charged with misconduct and often go through what may seem like a simple and straightforward disciplinary process.[42] However, challenging the disciplinary outcome in court can be difficult and complicated.[43] The consequences that stem from disciplinary hearings have a wide-reaching impact on an incarcerated individual's liberty and go beyond mere punishment.[44]

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35. *See infra* Part II.

36. *See infra* Part III.

37. *Id.*

38. *See infra* Part IV.

39. *See* LaFaso v. Patrissi, 161 Vt. 46, 54–55 (1993); Carrillo v. Fabian, 701 N.W.2d 763, 777 (Minn. 2005).

40. *See* WASH. STATE DEP'T OF CORR., *supra* note 2.

41. *Id.*

42. WASH. STATE DEP'T OF CORR., *supra* note 20.

43. WASH. STATE DEP'T OF CORR., DOC 460.140, HEARINGS AND APPEALS (2021), https://www.doc.wa.gov/information/policies/showFile.aspx?name=460140 (last visited Oct. 21, 2021) (outlining the required internal appeals process an incarcerated individual must go through before being able to challenge the disciplinary hearing in court).

44. *See infra* section I.B.

A. The Washington Disciplinary Hearing Process

When an incarcerated individual violates the prison rules or is charged with misconduct, correctional officers may issue a corresponding infraction through an incident report.[45] The infractions are then assessed at a prison disciplinary hearing.[46] While the accused incarcerated individual is allowed to give testimony during the hearing, the hearing officer can utilize different strategies to weaken or even silence the voice of the accused incarcerated individual.[47] The hearing officer will often interrupt and force them to skip over pieces deemed "irrelevant," without any explanation as to why.[48] The officer can also use a condescending, accusatory, and impatient tone, and frequently make comments that reveal a consistent assumption that the incarcerated individual is lying.[49] In a hearing where an incarcerated individual testified that he did not commit the infraction the infracting officer charged him with, the hearing officer stated, "So you expect me to believe that [the infracting officer] is really just making all of this up?"[50]

The alleged misconduct is evaluated in Washington State through the some evidence standard of proof[51] to decide whether the individual is guilty.[52] A standard of proof indicates the degree of proof necessary in order for a hearing officer in an internal prison disciplinary hearing to find an incarcerated individual guilty of violating a rule.[53] This differs from a standard of judicial review, which refers to the standard a court utilizes when inspecting the record of a disciplinary proceeding that an incarcerated individual has challenged.[54] Judicial review is generally limited to determining whether the fact finder relied upon sufficient evidence to support the judgment.[55] The fact finders in disciplinary

45. WASH. STATE DEP'T OF CORR., *supra* note 20, at 5; Armstrong, *supra* note 22, at 765.

46. WASH. STATE DEP'T OF CORR., *supra* note 20, at 5–6.

47. Disciplinary Record of Jonathan, *supra* note 3; Disciplinary Record of Doe 1 (2020) (on file with author); Disciplinary Record of Doe 2 (2020) (on file with author); Disciplinary Record of Doe 3 (2020) (on file with author).

48. *See* Disciplinary Record of Jonathan, *supra* note 3; Disciplinary Record of Doe 1, *supra* note 47; Disciplinary Record of Doe 2, *supra* note 47; Disciplinary Record of Doe 3, *supra* note 47.

49. *See* Disciplinary Record of Jonathan, *supra* note 3; Disciplinary Record of Doe 1, *supra* note 47; Disciplinary Record of Doe 2, *supra* note 47; Disciplinary Record of Doe 3, *supra* note 47.

50. Disciplinary Record of Doe 1, *supra* note 47.

51. *See infra* section III.C.

52. WASH. STATE DEP'T OF CORR., *supra* note 20, at 5–6.

53. WASH. ADMIN. CODE § 182-16-066 (2021); *see* Woodby v. Immigr. & Naturalization Serv., 385 U.S. 276, 282 (1966).

54. *See Woodby*, 385 U.S. at 282.

55. *Id.*

hearings consist of the reporting officer's peers, and the determination of guilt is made without a judge or jury.[56] If an incarcerated individual is found guilty, they are sanctioned for the disruptive conduct.[57] The type of sanction depends on whether the infraction was a serious or general infraction.[58]

In Washington State, general infractions in prisons may include unauthorized possession or theft, altering or destroying property, or disruptive behavior.[59] General violation sanctions may consist of a reprimand or warning, loss of privileges, such as commissary or visitation rights,[60] and partial cell confinement.[61] Serious infractions may include fighting with another individual, introducing drugs or drug paraphernalia into the facility, refusing to submit to a urinalysis test, or receiving a positive result on a drug test.[62] Serious infractions consist of four categories, with Category A being the most serious and Category D being the least serious.[63] Serious violation sanctions consist of more severe penalties than general violation sanctions.[64] They include solitary confinement and being denied good time credit[65]—also referred to as good conduct time. Good time credit allows for a reduced sentence as an incentive for positive behavior while incarcerated.[66] Loss of good time is not applicable for a first offense under Category C nor any offense under Category D.[67]

An incarcerated individual may choose to appeal a disciplinary decision.[68] The appeals panel consists of one community corrections supervisor serving a three month term, one hearing officer, and one hearing supervisor serving continually as the appeals panel chair.[69] The

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56. WASH. STATE DEP'T OF CORR., *supra* note 20.

57. *Id.* at 6, 9–10.

58. *Id.*

59. WASH. ADMIN. CODE § 137-28-220 (2021).

60. *FAQ: Breaking the Rules*, PRISON FELLOWSHIP, https://www.prisonfellowship.org/resources/training-resources/in-prison/faq-breaking-the-rules/?mwm_id=295748645994&sc=WB1710B10&sc=WB1710B10&gclid=EAIaIQobChMIwdrsqrDF8gIVQRB9Ch1vgQ0BEAAYASAAEgKFr_D_BwE [https://perma.cc/3VTE-7UR5].

61. WASH. ADMIN. CODE § 137-28-240.

62. *Id.* § 137-25-030.

63. *Id.*

64. *See id.* § 137-28-240; *id.* § 137-28-350.

65. *Id.* § 137-28-350.

66. WASH. REV. CODE ANN. § 9.94A.729 (West 2021).

67. PRISON SANCTIONING GUIDELINES, *supra* note 6, at 5–8.

68. *See* WASH. STATE DEP'T OF CORR., *supra* note 43, at 11.

69. *Id.*

panel reviews the available evidence at its discretion to determine if an error occurred.[70] By a majority vote, the panel will then affirm, modify, reverse, vacate, or remand the decision.[71] Once a disciplinary decision has been appealed through this DOC process, an incarcerated individual may challenge the disciplinary proceeding by filing a Personal Restraint Petition (PRP) with the Washington Court of Appeals.[72] The appellate courts in Washington State have jurisdiction in PRP proceedings.[73] To obtain relief through a PRP, the incarcerated individual must show that they are currently under restraint and that the restraint is unlawful.[74] An individual is under restraint if they are confined.[75]

A PRP is designed to only remedy serious violations of process.[76] Prison disciplinary hearings that infringe on constitutional rights and result in sanctions, such as loss of good time credits, may serve as a basis for such a serious violation.[77] However, if the issues presented are frivolous, then the petition will be dismissed.[78] The individual must present evidence to support factual allegations; conclusory allegations and speculation are insufficient for a PRP to be considered.[79] Although a PRP is meant for an incarcerated individual to obtain relief, judicial oversight of a prison administrative decision tends to be deferential to that decision in almost every respect so as not to curtail the order and security within the prison walls.[80]

B. Incarcerated Individuals Hold a Significant Liberty Interest in the Disciplinary Hearing Process

A guilty finding for a serious violation in a disciplinary hearing is of no small consequence. Washington created a statutory right to good time,

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70. *Id.*

71. *Id.*

72. WASH. R. APP. P. 16.3.

73. Toliver v. Olsen, 109 Wash. 2d 607, 611, 746 P.2d 809, 811–12 (1987); *see* WASH. R. APP. P. 16.3–.15.

74. *In re* Pers. Restraint of Malik, 152 Wash. App. 213, 218, 215 P.3d 209, 211 (2009); *see In re* Pers. Restraint of Cashaw, 123 Wash. 2d 138, 148–49, 866 P.2d 8, 13–14 (1994); WASH. R. APP. P. 16.4(a).

75. WASH. R. APP. P. 16.4(b).

76. *See id.* 16.11(b).

77. *In re* Pers. Restraint of Reifschneider, 130 Wash. App. 498, 501, 123 P.3d 496, 498 (2005).

78. WASH. R. APP. P. 16.11(b).

79. *In re* Pers. Restraint of Gronquist, 138 Wash. 2d 388, 396, 978 P.2d 1083, 1088 (1999).

80. Armstrong, *supra* note 22, at 759–60, 778; *see* Whitley v. Albers, 475 U.S. 312, 321–22 (1986); *see also* Rhodes v. Chapman, 452 U.S. 337, 349 n.14 (1981) ("[A] prison's internal security is peculiarly a matter normally left to the discretion of prison administrators.").

along with the deprivation of such.[81] While DOC can award good time—given for good behavior—to eligible incarcerated individuals,[82] an individual found guilty of a serious violation may be sanctioned to a loss of earned or future good time.[83] This sanction directly affects an incarcerated individual's sentence length.[84] Further, the DOC can award earned release time (ERT) to incarcerated individuals.[85] ERT consists of both good time and earned time.[86] Good time is given for good behavior, while earned time is achieved through participating in approved programs, such as employment and education.[87] ERT cannot exceed one-third of an incarcerated individual's sentence.[88] Of this percentage, two-thirds can consist of good time, and one-third can consist of earned time.[89]

The amount of good time credit lost for an infraction can be determined by the disciplinary hearing officer.[90] It is up to the officer's discretion whether to give a sanction taking away good time, and how much good time to take away.[91] Those serving the mandatory portion of their sentence are not eligible for parole and are subject to a loss of future good time available during the non-mandatory portion of their sentence.[92] The lost good time will then be applied to the remainder of the sentence after the mandatory period is served, thus extending their original sentence.[93] The superintendent or community corrections supervisor may request to schedule a disciplinary hearing to address an individual's time structure if

81. *See infra* section II.A. In Washington State, the Revised Code of Washington (RCW) and Washington Administrative Code (WAC), in reference to good time credits or earned release time, provide an existing state-created liberty interest that is protected by the Fourteenth Amendment. The RCW allows for an incarcerated individual's sentence to be reduced by earned release time. WASH. REV. CODE ANN. § 9.94A.729 (West 2021); *id.* § 9.95.070. "The earned release time shall be for good behavior and good performance, as determined by the correctional agency having jurisdiction." *Id.* § 9.94A.729(1)(a). The WAC, meanwhile, provides for any earned and future good conduct time to be taken away if the incarcerated individual is found guilty of certain serious infractions. WASH. STATE DEP'T OF CORR., DOC 350.100, EARNED RELEASE TIME 4 (2015), https://www.doc.wa.gov/information/policies/files/350100.pdf [https://perma.cc/CZK5-CVH3].

82. WASH. STATE DEP'T OF CORR., *supra* note 81, at 3–4.

83. *Id.* at 4.

84. WASH. REV. CODE ANN. § 9.94A.729 (West 2021).

85. WASH. STATE DEP'T OF CORR., *supra* note 81, at 2.

86. *Id.*

87. *See id.* at 4–5.

88. *Id.* at 3.

89. *Id.*

90. *Id.* at 4.

91. This discretion depends on the category and level of the offense and whether it is a first or subsequent offense. *See* PRISON SANCTIONING GUIDELINES, *supra* note 6. Race can also play an influential role in discretionary disciplinary decisions. Armstrong, *supra* note 22, at 764–65.

92. WASH. STATE DEP'T OF CORR, *supra* note 81, at 4.

93. *Id.*

they are serving an indeterminate sentence—an imposed sentence that is not given a definite duration—and have been denied all of their available good time.[94]

Individuals serving an indeterminate sentence fall under the jurisdiction of the Indeterminate Sentence Review Board (ISRB).[95] The Board makes decisions regarding an incarcerated individual's release or further incarceration with thorough consideration of the individual's past and present behavior.[96] When a hearing officer finds an incarcerated individual under the jurisdiction of the ISRB guilty of a serious violation and recommends either loss of good time credits or an increase in the minimum term, the Board is notified of this decision within ten days, or within ten days of the superintendent's decision if the individual was granted an appeal.[97] For other sanctions, the Board is informed within thirty days of the officer's decision, or if an appeal was granted, within thirty days of the superintendent's decision.[98] The loss of good time credits thus more heavily impacts the Board's decision regarding an individual's release from prison.

Looking back at Jonathan's situation, his staff assault was a serious violation.[99] Sanction options for this violation include confinement to cell, segregation, suspension of visitation, or loss of good time.[100] If the disciplinary hearing officer decides to sanction loss of good time, they can take away up to sixty days.[101] That is now a potential of up to an additional sixty days that an incarcerated individual can spend in prison. If the individual is serving a mandatory sentence, they must stay an extra sixty days.[102] If the individual is serving a sentence that is eligible for the ISRB, then they lose the opportunity to be released early by sixty days.[103] Despite loss of good time sanctions having recommended guidelines, an officer

94. *Id.* at 4.

95. *See id.* at 5.

96. *See Board Hearings*, WASH. STATE DEP'T OF CORR. (2021), https://www.doc.wa.gov/corrections/isrb/hearings.htm [https://perma.cc/A7Y9-U9V8].

97. WASH. ADMIN. CODE § 137-28-390(3) (2021).

98. *Id.* at § 137-28-390(4).

99. A staff assault is categorized as a Category B, Level 1 violation. DISCIPLINARY VIOLATIONS, *supra* note 6, at 1.

100. PRISON SANCTIONING GUIDELINES, *supra* note 6, at 3–4.

101. This depends on whether the offense is a first or subsequent offense within twelve months; first offenses can result in a loss of up to thirty days, second offenses can result in a loss of up to forty-five days, and third or subsequent offenses can result in a loss of up to sixty days. *Id.*

102. *See* WASH. STATE DEP'T OF CORR., *supra* note 81, at 4.

103. *Id.*

can take away additional time as long as there is approval.[104] If the officer decides the circumstances require a sanction beyond the maximum range, then they must submit a written recommendation to the superintendent.[105] When the sanction recommendation is in excess of the established guidelines, then the assistant secretary for prisons must approve.[106] Thus, there is great potential for extending an individual's sentence length drastically.

An individual's infraction history, whether for general or serious violations, can also often affect later infractions.[107] If Jonathan's threat of injury, also a serious violation,[108] was his first offense, then a loss of good time sanction would not be applicable. However, if the threat of injury was his third or subsequent offense within twelve months, he could have up to thirty days taken away.[109] Jonathan was found guilty of the threat of injury infraction, as well as the staff assault infraction, even though the evidence overwhelmingly indicated that he was innocent of the staff assault;[110] the some evidence standard of proof allowed for this.[111] This was Jonathan's second serious infraction within twelve months, so he was sanctioned with forty-five days' loss of good time, according to the higher level, staff assault infraction.[112]

II. THE CONSTITUTION ALLOWS FOR MORE LIMITED DUE PROCESS RIGHTS IN PRISONS

An incarcerated individual going through a prison disciplinary hearing receives more limited procedural due process rights than a defendant going through a criminal trial.[113] Although people who are incarcerated following conviction for a crime enjoy fewer constitutional protections of their individual liberty, the prison must still provide a minimum amount

104. WASH. STATE DEP'T OF CORR., DOC 460.050, DISCIPLINARY SANCTIONS 4 (2019), https://www.doc.wa.gov/information/policies/files/460050.pdf [https://perma.cc/U88S-YF27].

105. *Id.*

106. *Id.*

107. *See id.* at 2.

108. A threat of injury is categorized as a Category C, Level 1 violation. DISCIPLINARY VIOLATIONS, *supra* note 6, at 3.

109. PRISON SANCTIONING GUIDELINES, *supra* note 6, at 5.

110. *See supra* text accompanying notes 3–21.

111. Carrillo v. Fabian, 701 N.W.2d 763, 774 (Minn. 2005).

112. Disciplinary Record of Jonathan, *supra* note 3; PRISON SANCTIONING GUIDELINES, *supra* note 6, at 4.

113. Wolff v. McDonnell, 418 U.S. 539, 540–41, 561 (1974) ("Prison disciplinary proceedings . . . take place in a closed, tightly controlled environment peopled by those who have chosen to violate the criminal law and who have been lawfully incarcerated for doing so.").

of due process.[114] In *Wolff v. McDonnell*,[115] the United States Supreme Court laid out the required due process to be afforded to incarcerated individuals when a liberty interest exists that is protected by the Fourteenth Amendment.[116] The Court went on to narrow the definition of an existing liberty interest in *Sandin v. Conner*.[117] When a court looks at a claim for a violation of procedural due process, it looks at a two-part analysis: first, whether the state has interfered with a state-created liberty interest; second, whether one should have gotten more procedure than was received.[118] The Court established a three-factor balancing test in *Mathews v. Eldridge* to determine the minimum due process an administrative procedure needs to comport with.[119] Because due process is flexible, the required procedural protections align with what "the particular situation demands."[120]

A. Disciplinary Hearings Require Procedural Due Process

The Due Process Clause of the Fourteenth Amendment prohibits a state from depriving "any person of life, liberty, or property, without due process of law."[121] Although an incarcerated individual's liberty is already diminished in a correctional facility, their right to due process remains intact; this means that a prison must still provide some amount of protection before it harms their life, liberty, or property further.[122] When appealing an administrative procedure in court, an incarcerated individual must specify which regulation or statute created the liberty interest that is at stake.[123] In *Wolff*, incarcerated individuals brought a civil rights action challenging administrative procedures, including disciplinary hearing proceedings, at a Nebraska correctional complex.[124] When considering the

114. *Id.* at 555–56.

115. 418 U.S. 539 (1974).

116. *Id.* at 556–57.

117. 515 U.S. 472, 483–88 (1995).

118. Carrillo v. Fabian, 701 N.W.2d 763, 768 (Minn. 2005); *see Wolff*, 418 U.S. at 557–58 (discussing the state-created liberty interest and how it entitles one to minimum procedures); *Sandin*, 515 U.S. at 477–79 (beginning its due process analysis with *Wolff*).

119. 424 U.S. 319, 335 (1976).

120. Morrissey v. Brewer, 408 U.S. 471, 481 (1972).

121. U.S. CONST. amend. XIV, § 1.

122. *Wolff*, 418 U.S. at 556.

123. Once an incarcerated individual has appealed the disciplinary decision through the DOC process, then they may challenge the disciplinary proceeding with the Supreme Court or the Court of Appeals. *See* WASH. STATE DEP'T OF CORR., *supra* note 43, at 11–13; WASH. R. APP. P. 16.3; Sandin v. Conner, 515 U.S. 472, 483–85 (1995).

124. *Wolff*, 418 U.S. at 539.

incarcerated individuals' liberty interest, the Supreme Court in *Wolff* determined that a liberty interest could be statutorily created by the state.[125] Although the United States Constitution does not guarantee good time credit while in prison, a Nebraska statute[126] did.[127] Because Nebraska provided a statutory right to good time and allowed for the deprivation of the statutory right as a sanction for serious misconduct, the Court deemed it imperative to determine whether an individual's behavior constituted "serious misconduct."[128]

Once the Court concluded that there was a state-created liberty interest at stake, it then looked to the disciplinary procedures that due process required.[129] To make this consideration, it looked to the nature of the government function that was involved with the private interest being affected.[130] The Court determined that a prison disciplinary proceeding presented a very different situation than that of "free citizens in an open society, or for parolees or probationers under only limited restraints."[131] But the Court still noted that while the deprivation of good time did not compare to the revocation of parole or probation, it was still considerably important and significant because it was reserved as a sanction for serious misconduct.[132]

Further, the Court noted that disciplinary hearings imposing disagreeable sanctions can result in confrontation and retaliation between the incarcerated individuals and correctional officers.[133] An unyielding procedure likely raising the level of confrontation makes it more difficult to utilize the disciplinary process as a tool for modifying behavior and rehabilitation.[134] The proceedings should therefore adhere to due process requirements in order to advance these institutional goals.[135] In balancing the constitutional considerations with the goals and security of the institution,[136] the *Wolff* Court adopted several due process procedures required during disciplinary hearings: (1) advance written notice of the

125. *Id.* at 558.

126. NEB. REV. STAT. ANN. § 83-1,107 (West 2018).

127. *Wolff*, 418 U.S. at 558.

128. *Id.*

129. *Id.* at 560; Tiffany A. Werner, Edwards v. Balisok—*Is the Court Washing Its Hands of Prisoners' Due Process Rights?*, 28 SETON HALL L. REV. 650, 663 (1997).

130. *Wolff*, 418 U.S. at 560.

131. *Id.*

132. *Id.* at 561.

133. *Id.* at 562.

134. *Id.* at 563.

135. *Id.* at 562–63.

136. *Id.* at 563.

claimed violation; (2) a written statement of the fact findings for being found guilty and the evidence relied upon; (3) the right to call witnesses and present documentary evidence where such would not interfere with correctional safety or goals; (4) assistance in preparing for the hearing; and (5) a fair and impartial decision maker.[137]

The *Wolff* Court made note that changes in future years may require further consideration of its decision regarding the required procedures associated with an existing liberty interest.[138] The subsequent case, *Sandin*, further developed the law.[139] In a correctional setting, a liberty interest now exists when the prison's actions either result in conditions of confinement that go beyond what is typical[140] or inevitably affect the duration of an individual's sentence.[141] In *Sandin*, an incarcerated individual was placed into solitary confinement for thirty days after he was found guilty of misconduct at his disciplinary hearing.[142] He alleged there was a violation of due process because he was not allowed to have witnesses at his hearing.[143] However, the Court held that, unless the punishment imposed an "atypical and significant hardship on the [individual] in relation to the ordinary incidents of prison life," or prolonged the time spent in prison, then there was no right to the five procedures laid out in *Wolff*.[144] Atypical and significant hardship generally refers to extremely harsh and severe treatment.[145] The *Sandin* Court held that thirty days of solitary confinement was not an extremely harsh and severe punishment because it was "to be normally expected for one serving an indeterminate term of 30 years to life."[146] Although *Sandin* changed the law, it did not overrule the guaranteed due process rights.[147] Thus, good time credits are still entitled to *Wolff* protection.

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137. *Id.* at 561–67, 571, 580; Werner, *supra* note 129, at 663–65.

138. *Wolff*, 418 U.S. at 571–72 ("Our conclusion that some, but not all, of the procedures specified in *Morrissey* and *Scarpelli* must accompany the deprivation of good time by state prison authorities is not graven in stone.").

139. Sandin v. Conner, 515 U.S. 472 (1995).

140. *Id.* at 484.

141. *Id.* at 487.

142. *Id.* at 475–76.

143. *Id.* at 472.

144. *Id.* at 484–87.

145. *See* Key v. McKinney, 176 F.3d 1083, 1086–87 (8th Cir. 1999) (finding that twenty-four hours in shackles was not severe enough to violate due process); Giano v. Selsky, 238 F.3d 223, 226 (2d Cir. 2001) (holding that a total of 762 days in administrative segregation was severe enough to create a liberty interest implicating due process concerns); Gillis v. Litscher, 468 F.3d 488, 494 (7th Cir. 2006) (stating prison officials' motion for summary judgement would not be proper if plaintiff could show that officials acted with disregard of the substantial risk of serious harm).

146. *Sandin*, 515 U.S. at 475–76, 487.

147. *Id.* at 487.

B. Administrative Procedures Must Comport with Due Process

Once a court discerns that a protected liberty interest exists, it must consider the constitutional validity of an established administrative procedure.[148] The *Wolff* decision held that due process requires that incarcerated individuals are given certain procedures when the loss of good time is at stake.[149] The procedures required for prison disciplinary hearings "represent[ed] a reasonable accommodation between the interests of the inmates and the needs of the institution."[150] The "reasonable accommodation"[151] the Court spoke of foreshadowed the factors discussed in the *Mathews* decision, merely two years later.

In *Mathews*, a worker challenged the constitutional validity of administrative procedures for assessing Social Security disability benefits.[152] The Court in *Mathews* laid out three distinct factors to balance in order to determine whether an administrative procedure comports with the requirements of due process: (1) the private interest that the governmental action affects; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and (3) the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[153] The DOC is an administrative agency,[154] and thus the *Mathews* due process test applies to prison procedures. In the correctional context, courts give broad deference to the third factor, often conceding to the judgement of prison officials when considering the policies and actions needed to preserve or restore a prison's internal order.[155] While *Wolff* declared which procedures were constitutionally owed to incarcerated individuals,[156] *Mathews* expanded on how to determine whether an established procedure comports with due process.[157]

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148. Mathews v. Eldridge, 424 U.S. 319, 334–40 (1976) (discussing the sufficiency of procedures associated with termination of Social Security benefits when no evidentiary hearing was held prior to termination).

149. Wolff v. McDonnell, 418 U.S. 539, 557–58 (1974).

150. *Id.* at 571–73.

151. *Id.* at 572.

152. *Mathews*, 424 U.S. at 323.

153. *Id.* at 335.

154. WASH. REV. CODE ANN. § 72.09.010 (West 2021).

155. *See* Whitley v. Albers, 475 U.S. 312, 321–22 (1986); *see also* Rhodes v. Chapman, 452 U.S. 337, 349 n.14 (1981).

156. *Wolff*, 418 U.S. at 563–67, 571, 580.

157. *Mathews*, 424 U.S. at 335.

III. DISTINGUISHING STANDARD OF PROOF AND STANDARD OF REVIEW RESULTS IN CONFLICTING CONSTITUTIONAL REQUIREMENTS

While the holding in *Wolff* declared which procedures constitute required due process for an incarcerated individual in a disciplinary hearing, it did not speak to the standard of proof that should be used in the hearing.[158] Since then, the Supreme Court has declined to specify the required standard of proof. When deciding on a constitutional standard of proof generally, the Court has stated that it does not turn on any presumption favoring a particular standard.[159] It instead engages in "straight-forward consideration of the factors identified in [*Mathews*] to determine whether a particular standard of proof in a particular proceeding satisfies due process."[160] However, varying courts—at the state, federal, district, and appellate levels—are split on what the appropriate standard of proof to apply is for prison disciplinary hearings.[161]

Part of the reason for this split is that there is very little case law concerning the standard of proof used in DOC internal disciplinary hearings. When a court oversees a challenge to a disciplinary proceeding—whether it be a challenge to a procedure or to a decision—a court will often speak to the standard of review, but not to the standard of proof.[162] Justice Sandra Day O'Connor set out the standard for judicial review of a prison disciplinary hearing as some evidence in *Superintendent v. Hill*.[163] However, some courts erroneously rely on this decision when asserting some evidence as the constitutional standard of proof.[164] Other courts—recognizing that the *Hill* Court spoke to the standard of judicial review—have applied the *Mathews* factors when determining a standard of proof for prison disciplinary hearings.[165] These courts have decided that the some evidence standard of proof did not meet minimum due process, and subsequently held that the preponderance of

158. Preponderance of the evidence is the ordinary standard of proof for civil decision-making. See, e.g., Addington v. Texas, 441 U.S. 418, 423 (1979) (discussing the three standards of proof and noting that for civil cases the "plaintiff's burden of proof is a mere preponderance of the evidence").Unless stated otherwise in rules or law, this standard is applied in administrative hearings and brief adjudicative proceedings in Washington State. WASH. ADMIN. CODE § 182-16-066 (2021).

159. Santosky v. Kramer, 455 U.S. 745, 754 (1982).

160. *Id.*

161. *See infra* section III.B.

162. *See infra* section III.A.

163. 472 U.S. 445 (1985).

164. *See infra* section III.B.

165. *Id.*

the evidence standard was required.[166] Where some evidence allows for a fact finder to find an individual guilty with *any* amount of evidence,[167] preponderance of the evidence requires the fact finder to believe the individual is *more likely* guilty than not before declaring a finding of guilt.[168]

A. The United States Supreme Court Has Not Spoken to the Standard of Proof in Disciplinary Hearings for Incarcerated Individuals

In *Hill*, after several incarcerated individuals were found guilty of assault, they alleged that the evidence presented at the prison disciplinary hearings was inadequate under the Due Process Clause.[169] To support a decision revoking good time credit, the Court required the some evidence standard meet minimum due process. Accordingly, the some evidence standard would prevent arbitrary deprivations of private interests without imposing undue administrative burdens or threatening the institutional interests.[170] This holding examined the some evidence standard in regard to the required standard of judicial review—not to a standard of proof.[171]

When conducting judicial review, a court should not reweigh evidence, but rather determine "whether there is any evidence in the record that could support the conclusion reached by the disciplinary board."[172] The second procedural requirement for a disciplinary hearing that came out of the *Wolff* decision is a written statement of the facts for a finding of guilt as to the evidence relied upon and the reasons for the disciplinary action taken.[173] This requirement provides the written record that the court may look to during judicial review.[174] The standard *Hill* discussed encompasses the adequacy of the evidence that supports the disciplinary board's decision upon judicial review and not the standard of proof that

166. *Id.*

167. *Hill*, 472 U.S. at 455–56.

168. Herman & MacLean v. Huddleston, 459 U.S. 375, 390 (1983) (proving a claim by a "preponderance of the evidence" requires a party to show that it is more likely than not that its version of the facts is true).

169. *Hill*, 472 U.S. at 448.

170. *Id.* at 445.

171. *Id.* at 456 ("The fundamental fairness guaranteed by the Due Process Clause does not require courts to set aside decisions of prison administrators that have some basis in fact."); *see also* Hamdi v. Rumsfeld, 542 U.S. 507, 537 (2004) (citing *Hill* in stating that the government has used the some evidence standard as a standard of review when examining the administrative record after an adversarial proceeding).

172. *Hill*, 472 U.S at 455–56.

173. Wolff v. McDonnell, 418 U.S. 539, 563 (1974).

174. *Id.* at 565.

was used during the actual disciplinary hearing.[175]

Hill did not address the constitutional requirement for the initial standard of proof in prison disciplinary hearings; the Court "only spoke to issues involving standards of appellate review."[176] When *Hill* discussed some evidence as being the appropriate standard, it spoke to a court's review of a prison official's actions and decisions.[177] *Hamdi v. Rumsfeld*,[178] a United States Supreme Court case written by Justice O'Connor—the same justice who wrote the *Hill* majority opinion—acknowledged how the *Hill* decision should be interpreted: "[W]e have utilized the 'some evidence' standard in the past as a standard of review, not as a standard of proof. That is, it primarily has been employed by courts in examining an administrative record developed after an adversarial proceeding . . . ."[179]

B. Courts Disagree over Whether Hill*'s Analysis of Some Evidence Is the Standard of Proof or the Standard of Review*

There are numerous cases that cite or discuss *Hill* when examining the some evidence standard as a standard of judicial review.[180] However, there are also courts that rely on *Hill* for determining the standard of proof as some evidence in prison disciplinary hearings.[181] Courts that rely on *Hill* for determining some evidence as the adequate standard of proof for prison disciplinary hearings have conflated judicial review with the initial standard of proof.[182] The Eighth Circuit Court of Appeals in *Goff v.*

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175. Young v. Coughlin, No. CIV-87-877E, 1989 WL 132012, at *2 (W.D.N.Y. Oct. 25, 1989); *see also* Armstrong, *supra* note 22, at 780–81; Gerald L. Neuman, *The Constitutional Requirement of "Some Evidence"*, 25 SAN DIEGO L. REV. 631, 664 (1988).

176. Brown v. Fauver, 819 F.2d 395, 399 n.4 (3d Cir. 1987).

177. *Hill*, 472 U.S. at 456 (examining an administrative record of a disciplinary board reviewing "evidence in the form of testimony from the prison guard and copies of his written report"); Hamdi v. Rumsfeld, 542 U.S. 507, 537 (2004).

178. 542 U.S. 507 (2004).

179. *Id.* at 537 (citing *Hill*, 472 U.S. at 455–57; INS v. St. Cyr, 533 U.S. 289 (2001)); *see also* Neuman, *supra* note 175, at 663–64.

180. *See, e.g.*, Spalding v. Matthews, No. 89-3417-RDR, 1992 WL 363653, at *1 (D. Kan. Nov. 6, 1992) ("The constitutional evidentiary standard to be used to review a prison disciplinary proceeding is whether there is some evidence that supports the disciplinary action taken." (citing *Hill*, 472 U.S. at 455–56)); *Young*, 1989 WL 132012, at *2 ("But the inquiry [*Hill*] commands does not concern what legal standard of proof was in the contemplation of the disciplinary tribunal at the time of its hearing; instead it concerns the sufficiency of the evidence supportive of the disciplinary decision upon subsequent judicial review.").

181. *See* Goff v. Dailey, 991 F.2d 1437, 1442 (8th Cir. 1993).

182. *Compare Goff*, 991 F.2d at 1442 (relying on *Hill* in holding that the some evidence standard of proof in prison disciplinary hearings satisfies due process and not differentiating with the standard

Dailey[183] deemed the standard as appropriate, while the Southern District of Iowa District Court in *Goff*,[184] the Vermont Supreme Court in *LaFaso v. Patrissi*,[185] and the Minnesota Supreme Court in *Carrillo v. Fabian*[186] adopted their own approach. The latter three courts differentiated the two standards and required the preponderance of the evidence standard.[187]

In *Goff*, an incarcerated individual in Iowa brought a civil action against the prison superintendent and a correctional officer, alleging that the defendants violated his constitutional rights during a disciplinary hearing.[188] The district court originally held that the individual's right to due process had been violated because the disciplinary committee found him guilty using the some evidence standard of proof.[189] The district court's opinion gave a detailed explanation of the difference between a standard of proof and a standard of review, contending that *Hill* only identified some evidence as the standard of judicial review.[190] Looking to the *Mathews* factors, the district court noted that the risk of an erroneous deprivation of an incarcerated individual's liberty interest in their good time credits, or in remaining out of disciplinary segregation, was high if the some evidence standard of proof was used in the hearings.[191] The court reasoned that the preponderance of the evidence standard instead was appropriate because both the incarcerated individual's and the government's interests would be served.[192]

A divided panel of the Eighth Circuit disagreed with the district court but failed to distinguish between the two standards in *Goff*.[193] The Eighth Circuit—relying on *Hill*—reversed the district court's ruling and held the

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of judicial review), *with Spalding*, 1992 WL 363653, at *1 (citing *Hill* in stating that the some evidence standard is the constitutional standard for judicial review), *and Young*, 1989 WL 132012, at *2 (stating that *Hill* concerns the standard for judicial review and not the standard of proof).

183. 991 F.2d 1437 (8th Cir. 1993).

184. 789 F. Supp. 978 (S.D. Iowa 1992), *aff'd in part*, *rev'd in part*, 991 F.2d 1437 (8th Cir. 1993).

185. 633 A.2d 695 (Vt. 1993).

186. 701 N.W.2d 763 (Minn. 2005).

187. *See, e.g.*, *LaFaso*, 633 A.2d at 698 (concluding "that due process requires prison authorities to prove inmate disciplinary infractions by a preponderance of the evidence"); *Carrillo*, 701 N.W.2d at 777 (concluding "that the 'some evidence' standard is inappropriate for use by the DOC at the fact-finding level" and "that the preponderance of the evidence standard better protects against an erroneous deprivation of an inmate's liberty interest in his supervised release date and does not impose an unacceptable burden on the DOC").

188. *Goff*, 991 F.2d at 1438.

189. *Id.*

190. Goff v. Dailey, 789 F. Supp. 978, 982–86 (S.D. Iowa 1992), *aff'd in part*, *rev'd in part*, 991 F.2d 1437 (8th Cir. 1993).

191. *Id.* at 983–84.

192. *Id.* at 984.

193. *Goff*, 991 F.2d at 1440.

some evidence standard of proof was constitutional.[194] The court merely balanced the government's interests that were at stake and the administrative burdens that a higher standard of proof would impose, without focusing much on the other *Mathews* factors.[195] Judge Heaney dissented and agreed with the district court that *Hill* spoke only to the standard of judicial review.[196] He believed the majority treated the two standards as "essentially identical," and therefore relied on authority that only spoke to the standard of review in order to support its assertion about an adequate standard of proof.[197]

In *LaFaso*, the lead plaintiff challenged the constitutional validity of the Vermont DOC's use of the some evidence standard of proof for disciplinary hearings, arguing that the use of this standard violated due process.[198] The suit was certified as a class action on behalf of all past, present, and future incarcerated individuals subject to this standard.[199] In its opinion, the Vermont Supreme Court concluded that *Hill* described the appropriate standard of judicial review for the prison authority's actions, and that *Hill's* "ambiguous analysis" of such did not purport to resolve the question about standard of proof.[200] Therefore, the Court found that the case law in support of the some evidence standard was actually rooted in a standard applied by the United States Supreme Court for reviewing the facts found in a disciplinary hearing—judicial review.[201]

Because the Vermont Supreme Court recognized there was no accurate precedent for the standard of proof, it performed its own balancing test using the factors from *Mathews* to determine the standard that due process required.[202] The first factor—the affected private interest—was the incarcerated individual's "highly important interest" in not being unjustly disciplined.[203] The interest was high because there were numerous consequences stemming from the discipline.[204] Direct consequences

194. *Id.* at 1438.

195. *Id.* at 1441–42.

196. *Id.* at 1443 (Heaney, J., dissenting in part).

197. *Id.* ("Because the majority's assertion has neither precedential nor academic support, and because it portends gross violations of inmates' constitutional guarantees of due process, I respectfully dissent.").

198. LaFaso v. Patrissi, 633 A.2d 695, 696 (Vt. 1993).

199. *Id.*

200. *Id.* at 698.

201. *Id.*

202. *Id.* at 698–99.

203. *Id.* at 698.

204. *Id.*

included segregation and loss of good time,[205] while indirect consequences included the individual's classification,[206] programming,[207] and the length of their sentence.[208] A discipline record can further impact "any or all opportunity for early release or parole."[209] Under the second factor, there was significant risk of erroneous deprivation of the private interest when the some evidence standard of proof was employed.[210] While the Vermont DOC had procedural protections in place, the procedures were of little help when discipline could be imposed despite the evidence largely indicating an individual's innocence.[211] The some evidence standard allowed for a correctional officer's report to suffice.[212] The final factor—the government's interest in the process—was "undeniably strong."[213] The state had an interest in the administration of its prisons and in "swift and certain punishment" for disciplinary violations.[214] However, the Court found that the preponderance of the evidence standard of proof would not impose an undue hardship on the state, and if there was an additional burden created, it would be offset by the benefit of ensuring that disciplinary hearings produce correct decisions.[215] Based on the application of the *Mathews* factors to the relevant facts, the Vermont Supreme Court held that prison authorities must prove disciplinary infractions by the preponderance of the evidence standard of proof in order to comport with the Fourteenth Amendment.[216]

In *Carillo*, the Minnesota Supreme Court established that *Hill* only

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205. *Id.*

206. *Id.* In Washington, the goal behind classification is to minimize community risks, while offering opportunities for an individual's development. WASH. STATE DEP'T OF CORR., DOC 300.380, CLASSIFICATION AND CUSTODY FACILITY PLAN REVIEW 2 (2019), https://www.doc.wa.gov/information/policies/files/300380.pdf [https://perma.cc/2K2N-9GJU]. Classification consists of an incarcerated individual's custody level and facility placement, which are determined using a scoring tool that measures progress and evaluates risks to the community and agency needs. *Id.* at 8–15. Conduct and program efforts can affect an individual's facility placement. *Id.* 13–14.

207. *LaFaso*, 633 A.2d at 698. The Washington DOC provides agency and volunteer sponsored programs in order to occupy incarcerated individuals' time in a constructive and positive way. *Current Programming*, WASH. STATE DEP'T OF CORR., https://www.doc.wa.gov/corrections/programs/descriptions.htm [https://perma.cc/84ST-F48D].

208. *LaFaso*, 633 A.2d at 698.

209. *Id.*

210. *Id.* at 699.

211. *Id.*

212. *Id.*

213. *Id.*

214. *Id.*

215. *Id.*

216. *Id.* at 700.

addressed some evidence as the appropriate standard for judicial review, and not for a standard of proof.[217] After an incarcerated individual was found guilty of disorderly conduct in a disciplinary hearing, his sentence was extended by seven days.[218] He argued that because the hearing officer had utilized the some evidence standard of proof, his sentence was extended without sufficient procedural due process.[219] Thus, the incarcerated individual asserted that the Minnesota DOC violated his constitutional rights.[220] The Court understood the prevailing view surrounding some evidence to be that the standard was only suitable for use by an appellate court in the context of reviewing a prison administrative decision.[221] The Minnesota Supreme Court thus agreed with the implication from *LaFaso* that *Hill* only addressed some evidence as the appropriate standard for judicial review rather than for a standard of proof.[222] Because a state law can create a liberty interest,[223] the Court held that the use of mandatory language in Minnesota's determinate sentencing statute established a liberty interest in the supervised release date.[224]

Having concluded that the incarcerated individual had a protected liberty interest, the Court then determined whether the some evidence standard of proof offered sufficient protection of the interest by turning to the *Mathews* three-factor test as well.[225] Because the incarcerated individual had a state protected liberty interest in good-time credits, he had a strong interest in not losing his good time credits arbitrarily.[226] His

217. Carrillo v. Fabian, 701 N.W.2d 763, 775–76 (Minn. 2005).

218. *Id.* at 766.

219. *Id.* at 768.

220. *Id.*

221. *Id.* at 775.

222. *Id.*

223. *Id.* at 769.

224. *Id.* at 772–73. The statute required a defendant to be released from prison after serving two-thirds of his sentence, in which the term of imprisonment could be extended only if the individual committed a disciplinary offense. *Id.* at 773. The Court held in *Wolff* that Nebraska's sentencing scheme, which allowed for good-time credits to be accrued if an incarcerated individual did *not* commit a disciplinary offense, created a liberty interest. *Id.* at 772. Although the two sentencing schemes contained a subtle difference—Nebraska allowed for good-time accrual if no disciplinary offense was committed, where Minnesota had an initial presumption of a release date which was overcome if a disciplinary offense *was* committed—the Supreme Court of Minnesota found that the incarcerated individual maintained an *even stronger* liberty interest, and so any extension of the individual's sentence implicated due process protections. *Id.* at 772–73 ("We recognize that seven days of additional incarceration time may not appear long relative to two-thirds of a 114-month sentence, but it is important to emphasize that we conclude any extension of an inmate's period of imprisonment represents a significant departure from the basic conditions of the inmate's sentence.").

225. *Id.* at 776.

226. *Id.*

freedom was threatened by an extended sentence and thus the first factor was satisfied.[227] Looking to *LaFaso*, the Minnesota Supreme Court agreed that under the second factor, the risk of erroneous deprivation of an interest was high when applying the some evidence standard of proof.[228] With this standard, the hearing officer could find an incarcerated individual guilty even though the greater weight of the evidence indicated he was innocent.[229] Thus, the extension of an individual's sentence was probable—whether or not he was actually guilty—and other procedural safeguards that were put in place by the Minnesota DOC were rendered useless.[230] Lastly, for the third factor, the Court focused on the government's interest in preparing and rehabilitating incarcerated individuals for re-entry into society.[231] This interest was better achieved if the individuals were treated fairly, but the some evidence standard allowed for discipline regardless of whether an offense was committed.[232] It also sent the message that "once an individual [was] convicted of a crime, he [was] presumed guilty of every subsequent allegation."[233] This was in contrast to the fundamental principles of criminal law.[234] The Minnesota Supreme Court determined that the some evidence standard of proof had the potential to erroneously affect an individual's liberty interest.[235] Along with the district court in *Goff* and the Vermont Supreme Court in *Lafaso*, the Minnesota Supreme Court therefore concluded that a hearing officer was required to use the preponderance of the evidence standard during a prison disciplinary hearing.[236]

C. Washington State's Standard of Proof Is Not Supported by Legal Authority

Washington state's courts are also confused about the distinction between the constitutionally required standard of proof and the standard for judicial review. While Washington state has codified the entitlement to good-time credits in the Washington Administrative Code (WAC),[237]

227. *Id.*
228. *Id.*
229. *Id.*
230. *Id.*
231. *Id.*
232. *Id.*
233. *Id.* at 777.
234. *Id.*
235. *Id.*
236. *Id.*
237. WASH. ADMIN. CODE § 9.94A.729 (2021).

the DOC currently uses the some evidence standard of proof in disciplinary hearings.[238] This standard, though, lacks a statutory and regulatory basis. It is not codified in the Revised Code of Washington (RCW) or the WAC.[239] The only place where the Washington state standard of proof is documented is in the DOC Inmate Orientation Handbook,[240] which is not legally binding.[241] Because many states have codified their standard of proof either statutorily, in the administrative code, or in state DOC policies, it is rather unusual that Washington state has not codified the standard.[242]

Even if the some evidence standard was codified by Washington state for prison disciplinary hearings, it would run afoul of the United States Constitution.[243] While the Washington State Supreme Court seems to have endorsed the some evidence standard in dicta, a closer look at the Court's cases reveals not only a failure to make a distinction between the standard of proof and standard of review, but also an erroneous reliance

238. WASH. DEP'T OF CORR., *supra* note 2, at 20.

239. WASH. ADMIN. CODE § 137-28-310 (2021) (stating that "in reaching a decision, the hearing officer will consider only the evidence presented at the hearing," but providing no standard with which to consider the evidence). The RCW issues executive branch agencies the authority to create regulations and the WAC codifies the agency regulations, which are a source of primary law in Washington State. WASH. REV. CODE ANN. § 34.05.001 (West 2021); WASH. ADMIN. CODE § 1-21-005 (2021).

240. WASH. DEP'T OF CORR., *supra* note 2, at 20.

241. *See id.* at i ("Department of Corrections Policies and local Operational Memorandums may supersede the information obtained in this handbook."); *see also supra* note 239.

242. 103 MASS. CODE REGS. 430.16(1) (2021); MICH. COMP. LAWS ANN. § 791.252(k) (West 2021); STATE OF VT. AGENCY OF HUM. SERVS. DEP'T OF CORR., NO. 410.01, FACILITY RULES AND INMATE DISCIPLINE 11 (2012), https://doc.vermont.gov/sites/correct/files/documents/policy/correctional/410.01-facility-rules-and-inmate-discipline.pdf [https://perma.cc/JQT8-QMPL]; MINN. DEP'T OF CORR., NO. 303.010, OFFENDER DISCIPLINE 10 (2021), http://www.doc.state.mn.us/DocPolicy2/html/DPW_Display_TOC.asp?Opt=303.010.htm [https://perma.cc/DU5A-BZ96]; STATE OF IOWA DEP'T OF CORR., IO-RD-03, MAJOR DISCIPLINE REPORT PROCEDURES 17 (2017), https://doc.iowa.gov/sites/default/files/io-rd-03_major_discipline_report_procedures_0.pdf [https://perma.cc/X2DK-EUNJ]; IDAHO DEP'T OF CORR., NO. 318.02.01.001, DISCIPLINARY PROCEDURES FOR INMATES 6 (2018), https://forms.idoc.idaho.gov/WebLink/0/edoc/281212/Disciplinary%20Procedures%20for%20Inmates.pdf [https://perma.cc/2R8J-5FLA].

243. *See infra* Part IV.

on *Hill*.[244] Dicta and holdings are entitled to a very different weight.[245] Well-established case law refers to holdings, whereas dicta do not need to be followed and merely need to be given "respectful consideration."[246]

In re Personal Restraint of Reismiller,[247] a Washington State Supreme Court case published before *Hill*, indirectly connected the standard of judicial review to some evidence without explicitly speaking to a standard of proof.[248] *Reismiller* involved an incarcerated individual at the Washington State Penitentiary seeking review of a disciplinary hearing decision finding him guilty of marijuana possession.[249] The Court analyzed the extent to which it could review a prison disciplinary decision.[250] It found that review was properly limited to determining only whether the action was "so arbitrary and capricious as to deny the petitioner a fundamentally fair proceeding."[251] The Court further explained how "[a] broader scope of review [was] undesirable" because courts are reluctant to interfere with the internal administration of prisons.[252]

The Washington State Supreme Court also found the federal courts' "any evidence" test—to be construed the same as some evidence[253]—employed in reviewing disciplinary proceedings as consistent with its approach to the arbitrary and capricious standard of review.[254] Such arbitrary and capricious action exists when an incarcerated individual was "not afforded the minimum due process protections [required] in prison

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244. *In re* Pers. Restraint of Reismiller, 101 Wash. 2d 291, 295–96, 678 P.2d 323, 326 (1984) (discussing the standard that federal courts have employed in "reviewing prison disciplinary proceedings" and applying the same standard to a "disciplinary hearing committee finding"); *In re* Pers. Restraint of Grantham, 168 Wash. 2d 204, 216–18, 227 P.3d 285, 292–93 (2010) (citing *Hill* in stating that there needs to be some evidence "to affirm the discipline" but not differentiating between the standard of proof and the standard of judicial review); *In re* Pers. Restraint of Schley, 191 Wash. 2d 278, 287, 421 P.3d 951, 957 (2018) (quoting *Superintendent v. Hill*, 472 U.S. 445, 455–56 (1985) to assert that the some evidence standard "is satisfied by 'any evidence in the record' to support a guilty finding in a prison disciplinary proceeding" without noting the difference between judicial review and standard of proof).

245. *See* Carey v. Musladin, 549 U.S. 70, 70 (2006).

246. David Klein & Neal Devins, *Dicta, Schmicta: Theory Versus Practice in Lower Court Decision Making*, 54 WM. & MARY L. REV. 2021, 2025 (2013); *see also Carey*, 549 U.S. at 70; Protect the Peninsula's Future v. City of Port Angeles, 175 Wash. App. 201, 215, 304 P.3d 914, 921–22 (2013).

247. 101 Wash. 2d 291, 678 P.2d 323 (1984).

248. *Id.* at 295–97, 678 P.2d at 325–26.

249. *Id.* at 292, 678 P.2d at 324.

250. *Id.* at 293–97, 678 P.2d at 324–26.

251. *Id.* at 294, 678 P.2d at 325.

252. *Id.*

253. *In re* Pers. Restraint of Johnston, 109 Wash. 2d 493, 497, 745 P.2d 864, 867 (1987).

254. *Reismiller*, 101 Wash. 2d at 295–96, 678 P.2d at 326.

disciplinary hearings or if the decision [was] not supported by at least some evidence.[255] The some evidence standard applies "when evaluating the legality of a prison disciplinary decision which impose[d] a sanction of isolation or mandatory segregation time."[256] An appellate court evaluates the legality of a disciplinary decision, thus linking some evidence and arbitrary and capricious together as the standard being applied to judicial review.[257]

Another Washington State Supreme Court case, *In re Personal Restraint of Grantham*,[258] did not delve into or differentiate the standard of proof and standard of review, but used language correlated with how the Court has previously referred to judicial review.[259] The Court held that an incarcerated individual's due process rights were not violated when he challenged the discipline imposed on him for attempting to smuggle tobacco and marijuana into prison.[260] Grantham argued he was denied due process because the investigating officer's report did not list the time and place of the incident and did not state the time and date of the phone call that allegedly contained references to drugs.[261] This case did not focus on the standard of proof used in the prison disciplinary hearing, but briefly mentioned that "there has to be at least some evidence to affirm the discipline,"[262] citing to *Hill*.[263]

Additionally, Washington State Supreme Court case *In re Personal Restraint of Schley*[264] cited to *Hill* and failed to explicitly differentiate

255. *In re* Pers. Restraint of Krier, 108 Wash. App. 31, 37, 29 P.3d 720, 723 (2001).

256. *Johnston*, 109 Wash. 2d at 497, 745 P.2d at 867 (citing *Reismiller*, 101 Wash. 2d at 295–96, 678 P.2d at 326).

257. *See Reismiller*, 101 Wash. 2d at 295–96, 678 P.2d at 326; *In re* Pers. Restraint of Anderson, 112 Wash. 2d 546, 549, 772 P.2d 510, 512 (1989).

258. 168 Wash. 2d 204, 227 P.3d 285 (2010).

259. *Id.* at 214, 227 P.3d at 291 (using "arbitrary and capricious" when referring to "review of prison disciplinary proceedings"); *see also Reismiller*, 101 Wash. 2d at 295–96, 678 P.2d at 326 (stating any evidence and arbitrary and capricious standards as consistent for a standard of review); *Anderson*, 112 Wash. 2d at 549, 772 P.2d at 512 ("We have previously stated that a prison disciplinary hearing is reviewable only if the hearing was so arbitrary and capricious that it denied the inmate a fundamentally fair hearing."); *Krier*, 108 Wash. App. at 37, 29 P.3d at 724 (using the arbitrary and capricious standard in reviewing prison disciplinary proceedings).

260. *Grantham*, 168 Wash. 2d at 205, 218, 227 P.3d at 287, 293.

261. *Id.* at 216, 227 P.3d at 292.

262. *Id.*

263. *Id.* (citing *In re* Pers. Restraint of Gronquist, 138 Wash. 2d 388, 397 n.7, 978 P.2d 1083, 1088 n.7 (1999) ("Factual determinations of prison officials must stand if there is 'some evidence' in the record to support the prison disciplinary decision." (quoting Superintendent v. Hill, 472 U.S. 445, 455–56 (1985)))).

264. 191 Wash. 2d 278, 421 P.3d 951 (2018).

between a standard of proof and standard of review.[265] It discussed a PRP an incarcerated individual brought forward to reinstate his drug offender sentencing alternative (DOSA) that DOC revoked due to his alleged involvement in a physical altercation.[266] A person facing a DOSA revocation is entitled to the same due process rights as a person facing revocation of probation or parole.[267] For these types of revocations, due process requires that the DOC prove each violation allegation by the preponderance of the evidence standard.[268] The Court commented that "[t]his [was] a step up from the 'some evidence' standard that is satisfied by 'any evidence in the record' to support a guilty finding in a prison disciplinary proceeding."[269] After citing *Hill*, the Court ended the discussion without making a distinction between the two standards.[270]

IV. WASHINGTON STATE IS REQUIRED TO UPHOLD CONSTITUTIONAL DUE PROCESS RIGHTS FOR INCARCERATED INDIVIDUALS

Many courts incorrectly relied on *Hill* for determining the standard of proof for internal prison disciplinary hearings.[271] The difference between a standard of proof and a standard of judicial review is elementary, yet quite significant and crucial.[272] It is important to make a distinction between the standards because they play different roles regarding a prison disciplinary decision. The standard of proof weighs the evidence behind the decision, while the standard of judicial review evaluates it.[273] Courts that have made a distinction between the standards—thus realizing that *Hill* only spoke to the standard of review—determined that the correct standard of proof for disciplinary hearings is a preponderance of the evidence.[274]

Washington state has scant authority examining the standard of proof for the hearing officer's decision itself, and the precedent that does exist

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265. *Id.* at 287, 421 P.3d 957.

266. *Id.* at 280, 421 P.3d at 954.

267. *Id.* at 286, 421 P.3d at 956; *see also* State v. Dahl, 139 Wash. 2d 678, 683, 990 P.2d 396, 399–400 (1999).

268. WASH. ADMIN. CODE § 137-24-030(10) (2021).

269. *Schley*, 191 Wash. 2d at 287, 421 P.3d at 957.

270. *Id.*

271. *See supra* section III.C.

272. Woodby v. INS, 385 U.S. 276, 282 (1966).

273. *Id.*

274. LaFaso v. Patrissi, 633 A.2d 695, 700 (Vt. 1993); Carrillo v. Fabian, 701 N.W.2d 763, 777 (Minn. 2005); *see also supra* section III.B.

is muddled.[275] The few cases in which the Washington State Supreme Court discussed the some evidence standard only referred to the standard in dicta.[276] Not only did the Court erroneously rely on *Hill*, but it failed to explicitly declare whether it was discussing a standard of proof or a standard of review.[277] Washington state must apply the foundational *Mathews* due process analysis[278] to determine the necessary standard of proof because the state is without proper authority for its current some evidence standard of proof.[279] This analysis not only resolves the question of whether an administrative procedure is constitutionally sufficient,[280] but it also assures incarcerated individuals procedural fairness. The *Mathews* factors lead to a preponderance of the evidence as the required standard of proof for disciplinary hearings involving serious violations.[281]

A. The Mathews *Analysis Establishes the Some Evidence Standard as Unconstitutional*

In Washington state, an incarcerated individual has a state-created liberty interest in good time credits, thus entitling him to the minimum procedures required by due process in a serious-violation hearing.[282] The protected liberty interest in the date of supervised release relates directly to the first *Mathews* factor—the private interest that will be affected by the official action.[283] When an incarcerated individual has a liberty interest in good-time credits, they have a strong interest in assuring that the loss of their good time credits is not imposed arbitrarily.[284] Such a loss threatens their prospective freedom from confinement by extending the

275. *See supra* section III.C.

276. *In re* Pers. Restraint of Reismiller, 101 Wash. 2d 291, 295–96, 678 P.2d 323, 326 (1984); *In re* Pers. Restraint of Grantham, 168 Wash. 2d 204, 216, 227 P.3d 285, 292 (2010); *In re* Pers. Restraint of Schley, 191 Wash. 2d 278, 287, 421 P.3d 951, 957 (2018).

277. *See supra* section III.C.

278. *See* Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

279. *See supra* note 239.

280. *Mathews*, 424 U.S. at 334.

281. *See, e.g.*, LaFaso v. Patrissi, 633 A.2d 695, 700 (Vt. 1993) (holding the preponderance of the evidence standard of proof is appropriate after balancing the *Mathews* factors); Carrillo v. Fabian, 701 N.W.2d 763, 777 (Minn. 2005) (holding the preponderance of the evidence standard of proof protects against an erroneous deprivation of a liberty interest while not overburdening the DOC); *see also supra* section III.B.

282. *See supra* section II.A. The Nebraska sentencing scheme in *Wolff* allowed for good time credits to accrue if an incarcerated individual did not commit a disciplinary offense and took away the credits for serious misbehavior. NEB. REV. STAT. ANN. § 83-1,107 (West 2018). Washington's statutory scheme works similarly in affecting the duration of an individual's sentence, thus creating a liberty interest. *See supra* note 81 and accompanying text.

283. *See Carrillo*, 701 N.W.2d at 776.

284. *See id.*

length of imprisonment.[285] The private interest, therefore, is in not being unjustly disciplined, as there are direct and indirect consequences. A direct consequence is the loss of good time, along with various other potential sanctions, and indirect consequences relate to classification and programming, as well as sentence length.[286] Looking back to Jonathan, not only did his loss of good time sanction directly alter his sentence length, but he was also sanctioned to cell confinement, loss of personal property, loss of commissary, and loss of weightlifting privileges.[287] Not only was he subject to all of these sanctions, but Jonathan also received them due to a reaction that was out of his control. A disciplinary record informs future sanctions and can deprive an individual of "any or all opportunity for early release or parole."[288]

The second *Mathews* factor is the risk of erroneous deprivation of the affected private interest—not being unjustly disciplined—through the procedures used and the apparent value of additional or substitute procedural safeguards.[289] The risk is significant when the some evidence standard of proof is used. The standard allows a hearing officer to find an incarcerated individual guilty as long as there is a *piece* of evidence to support the infraction, meaning prison authorities can impose disciplinary sanctions despite the cumulative force of the evidence indicating an incarcerated individual's innocence.[290] This approach permits a guilty finding to be based entirely on another incarcerated individual's malicious accusation and tolerates the consideration of nothing more than a single correctional officer's statement. One individual's lie is therefore sufficient to undermine the sworn testimony of ten individuals. As in Jonathan's case, two correctional officers' negative statements were given more weight than nine correctional officers' supportive statements.[291] Thus, the DOC can effectively always meet its burden of proof under the some evidence standard, rendering the other procedural safeguards—written notice, a written record of evidence relied upon, the right to call witnesses and present evidence, assistance in the preparation for the hearing, and an impartial decision maker—essentially useless.

Accordingly, the evidentiary standard applied has a tremendous impact on the accuracy of the fact-finding process. The preponderance of the evidence standard of proof will raise the DOC's burden, thus providing

285. WASH. REV. CODE ANN. § 9.94A.729 (West 2021).

286. *See LaFaso*, 633 A.2d at 698–99.

287. Disciplinary Record of Jonathan, *supra* note 3.

288. *LaFaso*, 633 A.2d at 698–99.

289. Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

290. *See* Carrillo v. Fabian, 701 N.W.2d 763, 774 (Minn. 2005).

291. Disciplinary Record of Jonathan, *supra* note 3.

accountability for when the minimum procedural "safeguards" are lacking.[292] Due to previous biases and stressors from the job, many correctional officers have no sympathy for the incarcerated individuals they oversee.[293] This accountability is especially significant when a bias exists against the incarcerated individual from the beginning—before the officer has even reviewed any of the evidence.[294] Consequently, there cannot be any real guarantee of an impartial fact finder, so this deficiency shows the value in the preponderance of the evidence standard.[295]

When evaluating the third *Mathews* factor—the government's interest—the function involved must be considered, along with the "fiscal and administrative burdens that the additional or substitute procedural requirement would entail."[296] There is no denying that the state has a strong interest in the orderly administration of its prisons, including the interest in "swift and certain punishment" for disciplinary violations.[297] However, it is because of these interests that incarcerated individuals are not entitled to the full range of procedural protections afforded to those outside the prison walls.[298] The Eighth Circuit in *Goff* gave the government's interest heavy weight in order to justify some evidence as the constitutionally sufficient standard of proof.[299] However, the court of appeals focused almost exclusively on the government's interest and failed to consider the other *Mathews* factors, including the individual's interest and the erroneous deprivation of such.[300] Its opinion, therefore, "has neither precedential nor academic support."[301]

Although an adherence to the preponderance of the evidence standard of proof would require the production of additional evidence, the benefit of having cases more accurately decided would offset this burden. The government may have an interest in orderly administration, but it also has an interest in promoting fair procedures and effective rehabilitation.[302] If

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292. *Carrillo*, 701 N.W.2d at 776.

293. Alysia Santo, *What Prison Guards Really Think About Their Jobs*, MARSHALL PROJECT (Feb. 28, 2016, 10:00 PM), https://www.themarshallproject.org/2016/02/28/what-prison-guards-really-think-about-their-jobs [https://perma.cc/MS4Z-N8ML].

294. *See* Armstrong, *supra* note 22, at 760, 764–65, 770; *supra* notes 48–50 and accompanying text.

295. *See* ABA STANDARDS FOR CRIMINAL JUSTICE: TREATMENT OF PRISONERS § 23-4.2 cmt. on subdivision (d)(ii) (3d ed. 2011) [hereinafter ABA STANDARDS].

296. Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

297. LaFaso v. Patrissi, 633 A.2d 695, 699 (Vt. 1993).

298. Wolff v. McDonnell, 418 U.S. 539, 569–70 (1974).

299. Goff v. Dailey, 991 F.2d 1437, 1441–42 (8th Cir. 1993).

300. *Id.*

301. *Id.* at 1443 (Heaney, J., dissenting in part).

302. *See* Carrillo v. Fabian, 701 N.W.2d 763, 776 (Minn. 2005).

the DOC disciplines an incarcerated individual when they have not committed any offense—as often happens with the some evidence standard—no benefit is gained. The state should have no interest in punishing incarcerated individuals who are innocent of misconduct. If security concerns exist around an individual who is found not guilty, the individual "can [always] be reclassified to increase supervision."[303] They should not, however, be forced to face disciplinary sanctions. Additionally, the goals of rehabilitation and preparation "for re-entry into society are better achieved [when incarcerated individuals are] treated fairly."[304] Feeling valued can help motivate an individual to become more engaged and productive; an equitable disciplinary hearing process contributes to their success.[305]

B. Washington State Should Require the Preponderance of the Evidence Standard of Proof for Serious Violation Hearings

The current some evidence standard of proof allows a hearing officer to impose a sanction even if the officer believes it is more likely than not that an individual is innocent.[306] This lower standard sends the message to incarcerated individuals, as well as to our society at large, that once an individual is convicted of a crime, they are presumed guilty of every subsequent allegation. This message runs fundamentally against the principles of criminal law and justice[307] that guilt must be shown by competent evidence and that a defendant is innocent until proven guilty.[308]

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303. ABA STANDARDS, *supra* note 295, § 23-4.2 cmt. on subdivision (d).

304. *See Carrillo*, 701 N.W.2d at 776.

305. *Cf.* GORDON B. DAHL & MAGNE MOGSTAD, NAT'L BUREAU OF ECON. RSCH., THE BENEFITS OF REHABILITATIVE INCARCERATION (2020), https://www.nber.org/reporter/2020number1/benefits-rehabilitative-incarceration [https://perma.cc/9JK5-S2E7] (discussing how incarceration affects recidivism and effects of incarceration depends on "both prisoner characteristics and prison conditions"); Siddhartha Bandyopadhyay, *Why Rehabilitation—Not Harsher Prison Sentences—Makes Economic Sense*, CONVERSATION (Mar. 24, 2020, 10:01 AM), https://theconversation.com/why-rehabilitation-not-harsher-prison-sentences-makes-economic-sense-132213 [https://perma.cc/2LST-94RL] (comparing retribution and rehabilitation approaches to incarceration and stating "punishment is not the best solution for reducing the harmful impact of crime"); Lucía Dammert, *The Importance of Rehabilitation: What Works?*, JUST. TRENDS (Aug. 30, 2018), https://justice-trends.press/the-importance-of-rehabilitation-what-works/ [https://perma.cc/6EHE-ZKVF] (focusing on a new approach to rehabilitation because "[a] change in the system usually has a more effective and lasting impact than a personal change"); Etienne Benson, *Rehabilitate or Punish?*, 34 AM. PSYCH. ASS'N 46 (2003) (examining the negative impacts that the punitive philosophy of incarceration has had on rehabilitation).

306. *See supra* notes 167–168.

307. *Carrillo*, 701 N.W.2d at 777.

308. Coffin v. United States, 156 U.S. 432, 453 (1895); G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 11 (Dec. 10, 1948). The presumption of innocence is widely held to follow from the Fifth, Sixth, and Fourteenth Amendments. *See* U.S. CONST. amends. V, VI, XIV.

The preponderance of the evidence standard is widely supported as the appropriate standard of proof in prison disciplinary hearings,[309] which would require the hearing officer to believe the accused incarcerated individual to be more likely guilty than not before declaring such a finding of guilt.[310] Further, application of the preponderance of the evidence standard of proof accurately balances the *Mathews* factors.[311] An incarcerated individual's private interest is in being justly disciplined. While the some evidence standard of proof imposes a substantial risk of erroneously depriving this private interest, the preponderance of the evidence standard promotes a greater responsibility for upholding it. The standard would also function to encourage the government's interest in fair hearings and productive rehabilitation, thus offsetting any potential burden to the government's interest in swift punishment. Various states currently use the standard in prison disciplinary hearings, including Vermont,[312] Massachusetts,[313] Michigan,[314] and Minnesota.[315] These states' use of the preponderance of the evidence standard in prison disciplinary hearings demonstrates that if a burden does exist, it will not significantly impact the government's administration.

Ultimately, the preponderance of the evidence standard comports with due process requirements of the Fourteenth Amendment.[316] Therefore, Washington state should require the preponderance of the evidence standard of proof in prison disciplinary hearings for serious violations. The Washington State DOC can either codify the standard in the WAC,[317] or alternatively, the state legislature can implement the standard as law in the RCW.[318] Until the standard used in prison disciplinary hearings changes to the preponderance of the evidence, incarcerated individuals only have the option of continuing to appeal the some evidence standard

309. *See supra* notes 191–192, 202–216, 225–236. Even the American Bar Association's standards for criminal justice state that only the preponderance of the evidence standard of proof can determine that an incarcerated individual should be found guilty of a disciplinary offense when the possible sanctions include a delay of a release date or loss of sentencing credit for good conduct. ABA STANDARDS, *supra* note 295, § 23-4.2(d).

310. *See* WASH. ADMIN. CODE § 182-16-066 (2021); ABA STANDARDS, *supra* note 295, at § 23-4.2 cmt. on subdivision (d).

311. *See supra* section IV.A.

312. STATE OF VT. AGENCY OF HUM. SERVS. DEP'T OF CORR., *supra* note 242, at 11.

313. 103 MASS. CODE REGS. 430.16(1) (2021).

314. MICH. COMP. LAWS ANN. § 791.252(k) (West 2021).

315. MINN. DEP'T OF CORR., *supra* note 242, at 8.

316. *See supra* Part II.

317. WAC § 137-28-310 governs the decision of the hearing officer. WASH. ADMIN. CODE § 137-28-310 (2021).

318. RCW § 72.09 is the chapter governing the DOC. WASH. REV. CODE § 72.09 (2021)

up to the courts. However, since Washington state inaccurately relies on *Hill* for determining the standard of proof, this is likely a problematic path to continue on.

CONCLUSION

Although a prison institution may diminish an incarcerated individual's constitutional rights, the prison must still provide minimum due process protections.[319] Washington state uses the some evidence standard of proof in prison disciplinary proceedings, taking the little authority it has from the United States Supreme Court's decision in *Superintendent v. Hill*.[320] However, *Hill* only set forth the standard for judicial review when considering a claim challenging the disciplinary process, and not the standard of proof for the initial disciplinary hearing.[321] Courts that made this crucial distinction determined that the some evidence standard of proof did not meet the constitutional minimum due process requirements.[322]

To prevent a constitutional violation of an incarcerated individual's due process rights, this Comment goes through a *Mathews* three-factor analysis. As a baseline, a court must determine whether the state has interfered with a state-created liberty interest.[323] Then, a court can determine how much procedure due process requires by applying the *Mathews* factors.[324] Washington State created a statutory liberty interest in good conduct time; thus, the appropriate minimum due process requirements are warranted.[325] After exploring the incarcerated individual's private interest, the risk of its erroneous deprivation, and the government's interest, this Comment determines that minimum due process requires the preponderance of the evidence standard of proof in prison disciplinary hearings for serious violations. Following this standard will protect incarcerated individuals' rights by having correctly decided cases, thus preventing individuals from being unjustly disciplined.

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319. Wolff v. McDonnell, 418 U.S. 539, 555 (1974).

320. *See supra* section III.C.

321. *See supra* section III.A.

322. *See supra* section III.B.

323. *Wolff*, 418 U.S. at 558.

324. Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

325. *See supra* section II.A.